



Focus on Guidance on Application of the WAC 173-26 (2003 guidelines) to Less Than Comprehensive Updates or Amendments to Master Programs

From Ecology's Shorelands and Environmental Assistance Program

The SMA clearly anticipates that amendments to SMPs will be required. This includes very minor amendments up through broad subject amendments to comprehensive amendments. All of these amendments are subject to the same review criteria as established in RCW 90.58.090 which includes a requirement that the amendment be found to be consistent with the "applicable guidelines" as well as the policy of the SMA. The issue raised by the 2003 guidelines is how to do this when reviewing an amendment to a pre-existing non compliant SMP where the proposed amendment is clearly not intended to provide a comprehensive update of the SMP.

Unfortunately neither the law or the regulations speak directly to this issue in any way. Nor are there any cases before any of the Boards that would guide our approach to this issue. Therefore taking a systematic approach that is reasonable in terms of cost and effort for return, within the procedural framework of the law, and which is consistent with, and achieves the purposes of the law is most likely to be supported by the Boards in the event of a challenge in the future.

Review of "the Proposal"

WAC 173-26-120 states specifically that Ecology shall review "the proposal"; make written findings and conclusions regarding the consistency of "the proposal" with the SMA and the guidelines; and approve, deny or propose changes to "the proposal". This establishes the most basic of boundaries. Our review is not of all or any other part of the previously approved SMP, it is of the proposed changed to the SMP. While this is an important boundary to observe, it should not be construed as necessarily limiting our review to only the words that are new or changed. The change certainly must be considered in the context of the existing provisions being amended, other inter-related provisions and in some cases, the SMP as a whole.

Application of the 2003 Guidelines

WAC 173-26-201(1) could be read to require compliance with every step of the new SMA guidelines for virtually every minor amendment, (until such time as there is a minor amendment by a jurisdiction that has done a comprehensive amendment). Yet the statutory schedule for updates, and the SMA and SMA rules contemplate amendments that are less than comprehensive during the years upcoming, before there are comprehensive updates by all jurisdictions. To harmonize this situation, we believe that Ecology can consider proposals for amendments of SMPs that are less than the comprehensive amendment, but based on the following approach:

- First, as a threshold matter, the jurisdiction must recognize the general expectation of the State, as expressed through the recent amendments to the SMA and the adoption of the 2003 guidelines, is that a comprehensive review and amendment process must occur in the coming years, per the schedule provided in RCW 90.58.080. Therefore, a "less than comprehensive" amendment is not a right. Ecology will consider review of



those proposals and give appropriate priority to conducting a review based on the circumstances.

- Second, a less than comprehensive amendment should in fact be relatively minor for a jurisdiction. When more is involved in terms of uses, area, subject matter, then it becomes more likely that the procedural requirements, established in the WAC 173-26-201 applicable to comprehensive amendments, will be invoked above the minimum requirements of 173-26-100.
- Third, even minor amendments have to be consistent with relevant and applicable provisions of the 2003 guidelines (WAC 173-26 Part III). Appropriate inventory and scientific basis will be expected as necessary to assure that the proposed change is appropriate and consistent with the guidelines.
- Fourth, a minor amendment can't be approved if it is not reasonably consistent with any aspects of a comprehensive update that can be reasonably anticipated, or which reflects a major subject matter for comprehensive updating. The "less than comprehensive" update should not foreclose significant options that would be needed for effective comprehensive amendments.
- Minor amendments will be easier if they are creating protective measures, or if they are accompanied by sufficient new protective measures that it is clearly neutral or better with regard to the "no net loss of ecological functions of the shoreline." For example, a local government proposing something like a re-designation of a small undeveloped area for more intensive use might have to offer some early upgrades on other subjects or an offsetting area should be set apart for less intensive uses as a package to achieve compliance with the no net loss principle. The package could consider changes in uses allowed in environments, changes in environment designations, changes in mitigation requirements, assurances of stricter permitting requirements for the new area - anything that can show that the minor amendment is overall consistent with what will be required in a major amendment.

"Facts of the Case" Based Determination

Master program amendments come in all shapes, sizes and with a variety of purposes. No two are really alike. Therefore, each must be reviewed and decided upon individually based on facts specific to the case, primarily the content of the amendment and the physical setting that will be effected by the amendment including existing use character and environment. However there are some basic questions to be asked that can form the basis for a systematic determination.

General Standards of the Act/Guidelines

The broad principles of the guidelines, which reflect the act, provide a first level review of a proposed amendment:

1. No net loss of shoreline ecological functions.
2. Use Preference
3. Public Access and Use of the Shoreline.

Consideration of how the proposal addresses these issues will provide a basis for determining the need for further evaluation and the type of evaluation necessary. If a proposal clearly does not provide for consistency with these broad policies, then approval is essentially impossible. If a proposal addresses the policies then further consideration of the technical, scientific and factual basis for the proposal is appropriate. It may also be valid to conclude that these broad policies do not directly apply to the proposed amendment but such a conclusion should be

arrived at carefully and would most likely be limited to administrative provisions or other changes with little real impact.

Beyond the broad policies of the SMA, the guidelines include specific standards for various components of a master program as follows:.

Specific Standards of the Guidelines

1. Environment Designations
2. General Provisions
3. Shoreline Modification
4. Shoreline Uses

Any amendment should be evaluated first for which standards may be applicable and then for how the proposal is consistent with those standards. Unique to these standards is the provision for local government choosing an alternative approach. While this may complicate the consideration the basis idea remains that the any alternative must be equal to or better, in terms of consistency with the policy of the SMA and the guidelines. Clearly amendments such creation of a new environment, adding critical area provisions, or changing shoreline modification or use requirements must be evaluated for consistency with the specific provisions of the relevant sections. However care must also be exercised to assure that the proposed change does not directly or indirectly compromise the application of the existing SMP in a manner inconsistent with the guidelines.

Inventory and Technical Information Requirements

The extent to which collection of inventory information or establishment of the technical basis for a proposed amendment is required depends on the scope and content of the amendment. WAC 173-26-110 requires, with regard to re-designation of environments that the local government provide justification for the change “based on existing development patterns, biophysical capabilities and limitations of the shoreline being considered and the goals and aspirations of the local citizenry as reflected in the locally adopted comprehensive land use plan”. This clearly requires some level of inventory information about the site and its relationship to the overall shoreline area of the community. The appropriate level is that which is sufficient to demonstrate to Ecology, and by extension, the appropriate review Board (GMHBs or SHB) that the proposed re-designation is consistent with the guidelines and the SMA. The same basic approach should be taken with regard to all amendments.

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